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## ALIEN RIGHTS IN THE UNITED STATES IN WARTIME

THE large number of aliens in the United States presents one of the many problems with which the Government has had to deal in the present war. Technically every immigrant from Germany and Austria-Hungary who has not taken out papers of naturalization and who therefor still owes allegiance to the Fatherland is an enemy alien. But while the great majority of these aliens are naturally sympathetic with German war aims, or at least are not ready to give their wholehearted support to the Allies, they are not a source of danger to the United States. Only a small section have given evidence of disaffection, or have tried to cause trouble.

On the outbreak of war in 1914 the British Government placed restrictions on aliens residing within the United Kingdom and on May 13, 1915, yielding to popular demand, interned all German subjects because it was difficult to know who were and who were not engaged in some form of espionage.<sup>1</sup> The character of the enemy alien problem in France was more serious than in England, owing mainly to the proximity of France to Germany and to the rapid invasion of the country by the Germans; so the French Government considered that the public safety did not permit the enemy alien population to be left at large, as was done in England for some eight months after the beginning of the war. In the early days of the war, therefore, the greater part of the enemy alien population, particularly that of Paris, was removed to concentration camps located in the various parts of France.<sup>2</sup>

The situation in the United States was quite different from that of the countries of Europe, on account of the very large number of German subjects in this country,<sup>3</sup> although the danger from the presence of so large an alien population was less serious owing to the geographical remoteness of the United States from the theater of hostilities and its separation from the enemy country by the At-

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<sup>1</sup> "It was stated in the House of Commons on Dec. 14, 1915, that the number of enemy aliens then interned amounted to 45,749." *Amer. Jour. of Inter. Law*, Jan., 1918, p. 42.

<sup>2</sup> *Ibid.*, p. 46. "The Minister of the Interior stated, in December, 1915, that the number of German and Austro-Hungarian subjects then interned in concentration camps was about 45,000." Note 44.

<sup>3</sup> The total number of aliens registered in the United States on June 5, 1917, in accordance with the draft law, was 1,239,179. Of these 111,933 were German subjects (*Cong. Record*, July 13, 1917, p. 5554). These, of course, included only males between 21 and 30 years of age. The Census Bureau shows 2,349,000 Germans in the United States and 1,376,000 Austrians.—*Off. Bulletin*, June 12, 1917.

lantic Ocean. Efforts in this country have accordingly been limited to watching and arresting those enemy aliens whom there has been reason to suspect as spies or agents of the German Government.

#### PART I. ALIEN ENEMIES

##### *Law of 1798 — Text — Constitutionality*

The authority for dealing with the dangerous activities of enemy aliens was provided in an old law passed by Congress one hundred and twenty years ago (1798), giving to the President the power of regulating the conduct of alien enemies and of enforcing such regulations. This act of July 6, 1798, is as follows:<sup>4</sup>

“Whenever there is a declared war between the United States and any foreign nation or government \* \* \* and the President makes public proclamation of the event, all natives, citizens, denizens or subjects of the hostile nation or government, being males of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed, as alien enemies. The President is authorized \* \* \* to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject, and in what cases and upon what security their residence shall be permitted, and to provide for removal of those who, not being permitted to reside in the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.”

Although this law, along with the Sedition Act, passed by the same Congress, excited much opposition at the time, it remained upon the statute books even after the Jeffersonian party came to power; and in only one case has its constitutionality been questioned.

At the beginning of the War of 1812 Charles Lockington, a British subject, was living in Philadelphia. In conformity with President Madison's proclamation requiring all aliens living within forty miles of tidewater to report their presence to the nearest United States Marshal, Lockington reported to the Marshal at Philadelphia and was removed to Reading, where he obtained a limited liberty under parole. Later he was found at large in Philadelphia

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<sup>4</sup> Revised Statutes, 1878, Sec. 4067.

and he appealed to the courts against an order to convey him back to Reading.<sup>5</sup> His case came up first in the Pennsylvania courts and later before Justice Washington, sitting as a Federal Circuit Court Judge. Justice Washington sustained the President's action under the act of 1798 in the following words:<sup>6</sup>

"The power of the President under the first section of the law, to establish by his proclamation or other public acts, rules and regulations for apprehending, restraining, securing, and removing alien enemies, under the circumstances stated in that section, appears to me to be as unlimited as the legislature could make it. He alone is authorized to direct the conduct to be observed on the part of the United States toward such alien enemies \* \* \* It seems perfectly clear that the power to remove was vested in the President, because, under certain circumstances, he might deem that measure most effectual to guard the public safety. But he might also cause the alien to be restrained or confined, if in his opinion the public good should forbid his removal.

"If then the President was authorized to direct the confinement of alien enemies, without intending to remove them. I am of opinion that the powers vested in him, necessarily conferred all the means of enforcing his orders, and since it would be absurd to suppose that the President could personally enforce his own decrees, it follows that he might direct others to do it; and what officer of the government could, with so much propriety, be clothed with this authority, as the Marshals of the several districts? \* \* \* \*

"It is, in the next place, contended that, after the President has established such regulations as he may think necessary, the judicial authority must in every instance be resorted to to enforce them, and that the Marshal can act only under such authority. Such a construction would, in my opinion, be at variance with the spirit as well as with the letter of the law, the great object of which was to provide for the public safety, by imposing such restraints upon alien enemies, as the chief executive magistrate might think necessary, and of which his particular situation enabled him best to judge. \* \* \* Nothing in short, can be more clear to my mind, from an attentive consideration of the act in all its parts, than that Congress intended to make the judiciary

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<sup>5</sup> N. Y. Times, Apr. 7, 1917; 3, 5.

<sup>6</sup> *Lockington v. Smith*, Peters C. C. Reports, 466.

auxiliary to the executive, in effecting the great objects of the law; and that each department was intended to act independently of the other, except that the former was to make the ordinances of the latter the rule of its decisions."

Though the case was never carried to the Supreme Court of the United States and the old law therefore has never been passed upon by the highest court of record, Justice WASHINGTON's position in the *Lockington* case is borne out by the reasoning of Chief Justice MARSHALL when he was a member of the House of Representatives. In 1799 Thomas Nash, claiming to be Jonathan Robbins, a citizen of Danbury, Conn., was in jail at Charleston, S. C., charged with piracy and murder committed on board a British vessel on the high seas. President ADAMS, having "advised and requested" Judge BEE of the District of South Carolina that, in accordance with the Treaty of Amity with Great Britain, he deliver up Nash to the British Consul,<sup>7</sup> on February 20, 1800, a resolution was introduced into the House of Representatives that the decision by the President of the United States against the jurisdiction of the courts of the United States and his advice and request to the Judge of the District Court are "a dangerous interference of the Executive with judicial decisions; and the compliance of the Judge of the District Court of South Carolina is a sacrifice of the Constitutional independence of Judicial power, and exposes the administration thereof to suspicion and reproach."<sup>8</sup>

In the course of the debate on this resolution Representative John Marshall of Virginia clearly demonstrated:—

"1st, That the case of Thomas Nash, as stated to the President, was completely within the twenty-seventh article of the treaty between the United States and Great Britain.

"2d, That this question was proper for Executive, and not for Judicial decision; and

"3d, That in deciding it, the President is not chargeable with an interference with Judicial decisions.

"The points of law which must have been decided are," said Marshall, "whether the offence was committed within the British jurisdiction, and whether the crime charged was comprehended within the treaty." "But," he continued, "it by no means follows that they could only have been decided in court. A variety of legal questions must present themselves

<sup>7</sup> Annals of Congress, 10, 6th Cong., p. 516.

<sup>8</sup> *Ibid.*, p. 532.

in the performance of every part of Executive duty, but these questions are not therefore to be decided in court. \* \* \*

"The *casus foederis*, under the 27th article of the treaty with Great Britain, is a question of law, but of political law. The question to be decided is, whether the particular case proposed be one in which the nation has bound itself to act, and this is a question depending on principles never submitted to courts. \* \* \* \*

"The case was in its nature a national demand made upon a nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence, the demand is not a case for judicial cognizance. \* \* \* \*

"The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.

"He possesses the whole Executive power; he holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.

"He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty where he, and he alone, possesses the means of executing it. \* \* \* Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses."<sup>9</sup>

Although this episode did not involve the question of alien enemies, it is a case illustrating the power of the President to establish a decision of *political* law and to carry out such a decision independently of the other departments of the government.

#### *Proclamations and Legislation — 1917*

Relying upon the authority vested in him by the Act of 1798 President WILSON on April 6, 1917, immediately upon our declaration of war upon Germany, issued the following proclamation:

"All alien enemies are enjoined to preserve the peace towards the United States and to refrain from crime against the public safety, and from violating the laws of the United

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<sup>9</sup> Annals of Congress, 10, 6th Cong., pp. 612-616.

States and of the States and Territories thereof and to refrain from actual hostility or giving information, aid or comfort to the enemies of the United States, and to comply strictly with the regulations which are hereby or may be from time to time promulgated by the President; and so long as they shall conduct themselves in accordance with law, they shall be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States; and towards such alien enemies as conduct themselves in accordance with law, all citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States;

"And all alien enemies who fail to conduct themselves as so enjoined, in addition to all other penalties prescribed by law, shall be liable to restraint, or to give security, or to remove or depart from the United States in the manner prescribed by Sections 4069 and 4070 of the Revised Statutes, and as prescribed in the regulations duly promulgated by the President."<sup>10</sup>

In the same declaration the President established the following regulations:

Alien enemies were forbidden to possess fire arms, aircraft, wireless apparatus, signals, etc.; to approach within a half-mile of forts, camps, government vessels, etc.; to write or publish attacks against the Government; to commit hostile acts or give aid to enemies; to reside in prohibited area. Restrictions were placed on their departure or entrance, and provision was made, if necessary for the registration of alien enemies and their internment, and for summary arrest for suspicious acts, and for confinement.<sup>11</sup>

On November 16, 1917, additional regulations were prescribed by the President:

Alien enemies were forbidden to approach within one hundred yards of a canal, wharf, warehouse, or railroad terminal; to be present (except on public ferries) on any ocean, bay, river within three miles of the shore; to ascend into the

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<sup>10</sup> Proclamations of the President of the United States, No. 1364.

<sup>11</sup> *Ibid.*

air in an airplane or balloon; to be present in the District of Columbia or the Panama Canal zone. The attorney-general was authorized to fix further prohibited area, and to provide for the registration of alien enemies.<sup>12</sup>

On April 16th aliens as well as citizens were warned against acts of treason, for such acts are treasonable "wherever committed, whether by citizens of the United States or by an alien domiciled or residing in the United States, inasmuch as resident aliens as well as citizens owe allegiance to the United States and its laws."<sup>13</sup>

Besides the law of treason, which is defined as levying war against the United States, adhering to its enemies, giving them aid and comfort within the United States and elsewhere, the Espionage Act, passed by Congress June 15, 1917, further defines hostile acts. Stated briefly they are:

Obtaining or communicating information for the injury of the United States, inciting disloyalty, obstructing enlistments, injuring the means or objects of foreign commerce, illegal use of passports and of the mails.<sup>14</sup>

*Execution of Legislation and Administration of Regulations*  
*Arrests — Charges — Convictions, etc.*

On April 6th, immediately after the President's proclamation of that date, sixty arrests were ordered by Attorney-General Gregory. "It was said authoritatively that every man whose arrest was ordered was a German citizen, was known by the Department of Justice to have participated actively in German intrigues in this country, and was regarded as a dangerous person to be at large."<sup>15</sup>

Within the first month after the declaration of war 125 arrests were made,<sup>16</sup> with charges as follows:

Carrying firearms .....	5
Use of wireless apparatus .....	5
Securing information for the injury of the United States	6
Threatening the President .....	3
Inciting sedition .....	26
Conspiracy .....	3
Injuring the means of commerce.....	11
Espionage .....	17
Alien enemies .....	49 <sup>17</sup>

<sup>12</sup> *Ibid.*, No. 1408.

<sup>13</sup> *Ibid.*, No. 1368.

<sup>14</sup> Statutes, 65 Cong. Sess. I., ch. 30, p. 217.

<sup>15</sup> N. Y. Times, April 7, 1917; 1, 5.

<sup>16</sup> N. Y. Times, May 7, 1917, 10:2.

<sup>17</sup> N. Y. Times Index, Apr.-June, 1917.



During the entire period from the declaration of war up to January 1, 1918 (nine months) arrests were made as follows:

Alien enemies .....	305
Espionage .....	54
Presence in barred zones .....	222
Treason and conspiracy .....	50
Threats against the President .....	15
Pro-German language .....	11
Obtaining information .....	235
Inciting strikes .....	162
Sabotage (90 gyroscope workers).....	101
Unclassified .....	37
Total .....	1192 <sup>18</sup>

A large number of the above arrests were due to the participation of Germans in stirring up labor troubles, aiding anti-war agitation and encouraging the activities of anarchist groups. It is not always easy to draw the line between genuine reformers and pro-Germans; but to be on the safe side the Government has vigorously combated all movements opposed to the conduct of the war or tending to prevent enlistment and destroy the fighting spirit in the nation. The organization which has caused the greatest concern is the I. W. W. (Industrial Workers of the World) whose aim is to establish industrial democracy but which also approves methods of violence, such as the destruction of property or sabotage.<sup>19</sup> This has caused the Government to suspect that the organization is being encouraged by German interests. Considerable resentment has been expressed by Socialists, radicals, and others against these measures on the ground that the Government is acting autocratically in abridging the freedom of the press and other rights guaranteed under the Constitution. A truer opinion is that of Judge MAYER:<sup>20</sup>

"No American worthy of the name believes in anything else than free speech; but free speech means, not license, not counseling disobedience of the law. Free speech means that frank, free, full, and orderly expression which every man or woman in the land, citizen or alien, may engage in, in lawful and orderly fashion \* \* \* Obedience to the law is the fundamental basis of American life. Once that basis disappears

<sup>18</sup> *Ibid.*, Apr.-Dec., 1917. Statistics since Jan. 1st are not yet available.

<sup>19</sup> N. Y. Times, Current History Magazine, Oct., 1917, p. 23.

<sup>20</sup> Department of Justice, Washington, D. C.—Interpretation of War Statutes, Bulletin No. 38. Charge to the Jury of the U. S. Court, Southern District of N. Y.

or is destroyed, the whole fabric is destroyed, and the foundation upon which a Government of free men rests disappears."

Up to March 1, 1918, the only case which had come before the courts questioning the constitutionality of the President's proclamation under the Alien Act was one in the District Court for the Northern Division of the Middle District of Alabama, involving a subject of Austria-Hungary, who having been arrested and detained as an alien enemy, petitioned for a *habeas corpus*. Judge CLAYTON delivered the following opinion in the case:<sup>21</sup>

"The President, acting in the manner and under the powers vested in him by law, has determined that the petitioner is a person who, either for the safety of the United States or for the petitioner's own protection, should be restrained or interned. He has further decided that this alien enemy should be restrained as prescribed in section 4067, Revised Statutes. The officers of the law have taken the summary action authorized by that section and the question is presented by petitioner whether this action of the President is subject to judicial review. The court thinks not. \* \* \* It may well be said of the power conferred upon the President to remove alien enemies, as was said of the power conferred upon him to call forth the militia to suppress insurrections:

Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts (*Martin v. Mott*, 12 Wheat., 19, 31). The Court is of the opinion that such is the true construction of section 4067, Revised Statutes United States and that the President, or the officers through whom he acted, is the exclusive judge of whether Graber was such an alien enemy as for the safety of the United States should be restrained as provided by law.

"In this case, the President \* \* \* has acted through the proper officials and their determination that Graber is an alien enemy who should be restrained or interned is final and conclusive and is not the subject of review by the courts."<sup>22</sup>

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<sup>21</sup> Interpretation of War Statutes, Bulletin, No. 51, p. 4. Ex parte Oscar Graber.

<sup>22</sup> *Ibid.*, p. 6. Compare *U. S. v. Ju Toy*, 198 U. S. 261, and *Japanese Immigrant Case (Yamataga v. Fisher)*, 189 U. S. 97—"That Congress may exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain

## INTERMENT

The larger number of interned Germans are prisoners of war. Most of them are officers and men who formed the crews of German vessels seized in American ports. Early in June there were 1,310 prisoners of war at Fort McPherson, Ga., most of whom had been seamen on German ships, and between 2,000 and 2,500 prisoners taken from German merchantmen, at Hot Springs, N. C. These prisoners are employed at labor according to rank and aptitude, officers excepted (500 were sent to army camps to aid in cultivating gardens) and are paid, clothed, and fed in accordance with the rules of international war.

In expectation of looking after large numbers of prisoners the War Department has organized five chief bureaus:

"(1) A bureau of administration, charged with the composition and personnel of the guards, the pay, rations, clothing, and transportation.

(2) A bureau of employment in charge of the labor of prisoners, both within their places of internment and on Federal, State and private projects without the prisons.

(3) A bureau of religious and educational welfare to conduct all matters of religion, education, recreation, and Red Cross and benevolent assistance.

(4) A bureau of inquiry, charged with the custody of the records of war prisoners, and, through which information concerning the prisoners will be transmitted to the enemy's government and to the National Red Cross Society.

(5) A bureau of repatriation, charged with the final restoration of prisoners to their home country at the conclusion of hostilities."

The other chief group of interned aliens are those arrested on suspicion of being spies; 839 of whom are interned at Fort Oglethorpe, Ga., and 432 at Fort Douglas, Utah. These persons were connected either directly or indirectly with the German Government or with great financial, industrial, or maritime concerns owned or controlled by German Interests.<sup>23</sup>

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classes of aliens may come to this country, establish regulations for sending out of the country such aliens as come here in violation of law, and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court." 3 *Official Bulletin*, June 8, 1918, p. 1.

<sup>23</sup> N. Y. Times Current History Magazine, VII, ptl. No. 1, p. 21, Oct., 1917 (p. 22).

## REGISTRATION

In his proclamation of November 16, 1917, President WILSON authorized the Attorney-General to register alien enemies when it should be deemed necessary.<sup>24</sup> January 2, 1918, therefore, rules for the registration of German alien enemies were issued by the attorney-general; the War Work Division of the Department of Justice was to have charge of the work, which was to take place the week beginning February 4th. "All nationals, citizens, denizens, or subjects of the German Empire or of the Imperial German Government, being males of the age of 14 years and upward, in all land and water, continental or insular, within the jurisdiction of the United States" were required to register. After registration registrants must keep registration card on their person.<sup>25</sup> Instructions were issued to all postmasters to assist in carrying out the registration by assisting the police in the cities and executing the details of the registration in towns of less than 5,000.<sup>26</sup>

## NATURALIZATION

There are a very great many aliens in the United States who have not desired, or at least have not availed themselves of, the privilege of naturalization, even though eligible. The Bureau of Education (Department of the Interior) by investigation have shown that 5,000,000 persons of foreign birth do not speak the English language, while 3,000,000 males of military age (18 to 45) in the United States are unnaturalized.<sup>27</sup> Since war was declared many aliens have sought citizenship and have made application for first papers, and others who are eligible for full citizenship. Among these were subjects of Germany and Austria-Hungary; they however have not been permitted to complete their naturalization during the war. This is in accordance with the Act of July 30, 1813:

"No alien who is a native citizen or subject, or a denizen of any country, state or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States."<sup>28</sup>

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<sup>24</sup> Official Bulletin.

<sup>25</sup> Official Bulletin, Jan. 2, 1918.

<sup>26</sup> Official Bulletin, Jan. 14, 1918. Registration was extended to female aliens and instructions issued for the week of June 17-26, 1918. Official Bulletin, June 10, p. 1.

<sup>27</sup> Official Bulletin, March 19, 1918, p. 7.

<sup>28</sup> Revised Statutes, section 2171.

In the case of John Meyer, Justice CROUSEY of Brooklyn on July 17, 1917, applied this act to the present war situation, although holding that the rule did not apply to aliens who had made their application for second papers before the date of the declaration of war, but had not yet at that time obtained them.<sup>29</sup>

## PART II. ALIEN ENEMY PROPERTY

### LEGISLATION PREVIOUS TO 1917—CONSTITUTIONALITY

So far we have been considering the personal conduct of alien enemies and the necessary regulations which have been prescribed to govern their behavior in the United States. In the second part of this paper let us discover how the Government has found it necessary to treat the property of alien enemies.

No legislation regarding enemy property stood on the statute books, ready for the President to use as he should find necessary. But Congress had certain precedents in legislation the constitutionality of which had been upheld. The first trading-with-the-enemy act enacted by the National Government of the United States was the Act of July 6th, 1812 (2 Stat. L. 778), which provided<sup>30</sup> that American owned vessels before clearance should give bond not to trade with the enemy; that any "wagon, cart, sleigh, boat, or thing by which naval or military stores, arms or munitions of war or articles of provision are transported or attempted to be transported into Canada, Nova Scotia, or New Brunswick, together with such naval or military stores, etc., shall be forfeited to the use of the United States"; and that persons aiding or privy to offences against the act shall be liable to fine and imprisonment.

During the Civil War, Congress passed the Non-Intercourse Act of July 13th, 1861 (12 Stat. L. 255). It empowered the President by proclamation to declare that the inhabitants of a State or a part thereof were to be considered in insurrection," and thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from such State or section, into the other parts of the United States, and all proceeding to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons

<sup>29</sup> N. Y. Times, July 18, 1917, p. 4:2.

<sup>30</sup> Huberich, Charles Henry: *Trading with the Enemy*, p. 25.

to or from such State or section be forfeited to the United States". In regard to the constitutionality of this act, it was said that

"the power of the government to impose such conditions upon commercial intercourse with an enemy in time of war as it sees fit, is undoubted. It is a power which every other government in the world claims and exercises, and which belongs to the government of the United States as incident to the power to declare war and to carry it on to a successful termination".<sup>31</sup>

Such a measure need not be directed alone against the subjects of an enemy state; it may include neutrals or even citizens of the United States who by their domicile or acts acquire a hostile character. The question is treated at length in *Miller v. United States*,<sup>32</sup> where Justice STRONG says:

"But if the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States; if, on the contrary, they are an exercise of the war powers of the government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments. This we understand to have been conceded in the argument. The question, therefore, is, whether the action of Congress was a legitimate exercise of the war power. The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and dispose of it at the will of the captor. This is and always has been an undoubted belligerent right \* \* \* It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its owner-

<sup>31</sup> Bradley, J., in *Hamilton v. Dillin*, 21 Wall. 73.

<sup>32</sup> 11 Wallace, 268.

ship. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. (*The Venus* (1814), 8 Cr. 253.) In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war."

#### LEGISLATION OF 1917

The most important measure passed since the declaration of war in regard to alien property is the Trading-with-the-Enemy Act, which became law October 6, 1917. A brief synopsis of the law follows:<sup>33</sup>

Section 2 defines "enemy and ally of enemy (chiefly on basis of domicile) as,

(a) persons residing in enemy or ally-of-enemy country or trading therein (including foreign corporations);

(b) government officials, etc., or any nation or ally of nation with which the United States is at war;

(c) such other persons as may be designated by the President.<sup>34</sup>

Section 3 defines unlawful acts as,

(a) trading in the United States with enemy or ally-of-enemy without a license;

(b) transporting enemy or ally-of-enemy to or from the United States without a license;

(c) unauthorized sending or receiving letters except by mail;

(d) evasions of censorship to foreign countries, use of code, etc.

Section 4 permits enemy insurance companies to continue business if licensed, provided no funds are transmitted abroad.

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<sup>33</sup> 65th Cong. Sess., I, ch. 106, p. 411.

<sup>34</sup> The President has designated interned aliens and alien enemy women. Off. Bull., Apr. 22, 1918, p. 1.

Sections 6-9 authorize an Alien Property Custodian empowered to receive all enemy property in the United States, on condition of giving bond and detailed annual statements, the moneys to be deposited in the Treasury, and claims for them after the war to be settled by Congress.

Section 10 makes permissible

- (a) applications for United States patents and copyrights, by an enemy ;
- (b) payment of patent fees to enemy country by citizens ;
- (c) manufacture under patents owned by enemy, under license.

October 12th the President issued an Executive Order,<sup>35</sup> vesting the power conferred by this act in certain officers and boards. The War Trade Board was established and authorized to issue licenses for the exportation and importation of all articles prescribed, except coin, bullion and currency and licenses for trading with the enemy or ally of the enemy. The Secretary of the Treasury was vested with the power of transporting of coin, bullion, currency and credits, and the regulation of enemy insurance companies. A Censorship Board was established for the censorship of all communications transmitted from the United States to any foreign country. The Federal Trade Commission was vested with the power of licensing of United States citizens or corporations to apply for letters patent and the registration of copyrights in enemy countries, or to manufacture goods under an enemy owned patent. The Postmaster-General was authorized to issue permits to publish newspapers, articles, etc., printed in a foreign language. The Secretary of State was empowered to issue licenses for the transportation of enemies and enemy allies. The office of Alien Property Custodian was created and vested with power to receive and hold enemy property, and to administer sections 8 and 9 of the Trading with the Enemy Act.

#### EXECUTION AND ADMINISTRATION

The administration of the above legislation may best be treated under special heads which are of chief importance to us from the standpoint of enemy property.

#### GERMAN INSURANCE COMPANIES

German Insurance Companies had already received attention in the President's earlier proclamations. On April 6th, 1917, he an-

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<sup>35</sup> Huberich, Appendix A, p. 349. Official Bulletin, Oct. 17, 1917.



nounced that branches established in the United States would be permitted to continue business, provided they conducted themselves according to the laws of the state in which they were located and transmitted no funds outside the United States and were not used as a basis for the establishment of credit for the benefit of the enemy.<sup>36</sup> On July 13th, 1917, branch establishments of German insurance companies were prohibited the business of marine and war risk insurance, the existing contracts being suspended during the war, and the funds of the German companies to be disposed of as prescribed by state officials.<sup>37</sup> On November 27th Secretary McAdoo announced that all German insurance companies, except life, should be liquidated and the interest put in the hands of the alien property custodian.<sup>38</sup>

The Secretary of the Treasury, according to the Executive order of October 12, 1917, issued licenses to fourteen insurance companies to continue in business for the purpose of liquidation under the general supervision of the alien property custodian. Three other companies, which made no application for license, are also in process of liquidation. In the last published statement of these seventeen companies (1916) their total gross assets were \$40,612,887.74 and net assets \$11,802,388.29;<sup>39</sup> upon final liquidation the net proceeds will be paid to the custodian.

#### PATENTS

One of the most important provisions of the Trading with the Enemy Act is the section which provides that applications for United States patents, copyrights, etc., may be made by an enemy, that citizens of the United States may pay patent fees to an enemy country, and that United States citizens may, under license from the President, manufacture under patents owned by the enemy. The applicant for such a license must furnish guaranties that he is able and intends in good faith to use his privilege; he also must pay a minimum fee of \$100 and 1% of a deposit of 5% of the gross receipts derived from his use of the license. The license shall continue during the term of the patent, but within one year after the close of the war the enemy owner of the patent may recover payment in a district court of the United States of a reasonable royalty from the licensee. The sum thus recovered will come from the deposit above

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<sup>36</sup> Proclamations of the President, No. 1366.

<sup>37</sup> *Ibid.*, No. 1386.

<sup>38</sup> Official Bulletin, No. 170, p. 1.

<sup>39</sup> *Ibid.*, Jan. 26, 1918, p. 11.

mentioned, which thus constitutes a trust fund in the Treasury of the United States for the benefit of the enemy owner.<sup>40</sup>

The Federal Trade Commission, which was commissioned by the President to regulate this division of the Act, issued the first license under the patents section November 3, 1917.<sup>41</sup> About 20,000 patented and copyrighted articles were affected by the regulations, including dyestuff formulas and valuable medical cures.<sup>42</sup> The licenses were granted only after extensive experimenting and careful investigation to determine the value of the patents. "The licenses for American use of the enemy patents in nearly all cases are for the entire life of the patent instead of only for the duration of the war."<sup>43</sup> The concerns to benefit by the licenses will pay the alien property custodian 5% of their gross receipts from the sales of the articles involved or 5% of a valuation determined by the Federal Trade Commission.<sup>44</sup>

#### ENEMY VESSELS

The first statement in regard to enemy shipping was the Joint Resolution of the Senate and House of Representatives (May 12, 1917), authorizing the President to take over to the United States

"the immediate possession and title of any vessel within its jurisdiction (including the Canal zone, and all territories and insular possessions except the Virgin Islands) which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under regulation of any such nation, or subdivision, or municipality thereof, and through the United States Shipping Board or any department or agency of the Government to operate, lease, charter, or equip such vessels in any service of the United States or in any commerce, foreign or coastwise."

Section 2 authorized and directed the Secretary of the Navy to appoint, subject to the approval of the President, a board of survey whose duty was to ascertain the actual value of the vessels and equipment taken over (these findings to be considered competent evidence in all proceedings in any claims for compensation).<sup>45</sup>

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<sup>40</sup> Statutes—65th Cong. Sess. I, ch. 106.

<sup>41</sup> Official Bulletin, No. 150, p. 3.

<sup>42</sup> N. Y. Times Curr. Hist. Mag. Jan., 1918, p. 62.

<sup>43</sup> Official Bulletin, Mar. 25, 1918, p. 8—Federal Trade Commission Report.

<sup>44</sup> *Ibid.*

<sup>45</sup> Statutes, 65 Cong. Sess. I, ch. 13, p. 75.

Title II of the Espionage Act supplemented this legislation with the following provision, applicable to all foreign vessels within American jurisdiction:

"Whenever the President by proclamation or Executive order declares a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance, or threatened disturbance of the international relations of the United States, the Secretary of the Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of rights and obligations of the United States, may take, by and with the consent of the President, for such purposes full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof."<sup>46</sup>

Under the authority of the above legislation the President July 10th ordered eighty-seven German vessels taken over for the United States. The officers and crews were interned and the ships refitted for service as transports or for other uses in the United States navy.<sup>47</sup> Later in the year the President by proclamation authorized the Secretary of the Treasury to make the regulations as outlined by the section of the Espionage Law quoted above.<sup>48</sup>

#### ALIEN PROPERTY CUSTODIAN

Most interesting to us, however, are the sections of the Enemy Trading Act in respect to the Alien Property Custodian. There has been much confusion as to the extent of his powers. On October 26th, 1917, the Custodian gave out a statement explaining that

"citizens and subjects of Germany and its allies resident within this country are not included within the term 'enemy or ally of enemy' as employed in the Trading-with-the-Enemy-

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<sup>46</sup> *Ibid.*, ch. 30.

<sup>47</sup> Official Bulletin, July 10, 1917, p. 1.

<sup>48</sup> Proclamations, No. 1413, Dec. 3, 1917.

Act. The moneys on deposit in banks in this country belonging to such persons are not liable to seizure by the Government, and will not therefore be taken into the custody of the Alien Property Custodian."<sup>49</sup>

Again on October 30th, he stated that

"Deposits in the postal savings banks of the United States belonging to such persons are not liable to seizure by the Government, etc."<sup>50</sup>

And again on November 14th:

"False reports of plans and purposes of the Alien Property Custodian have caused unnecessary and illfounded alarm and has led in some localities to heavy withdrawals of postal savings and bank deposits. The *test of enemy character* under the act of Congress is one of residence or place of business or business connections rather than nationality or citizenship—a subject of Germany is permitted to continue in trade and commerce and in possession and control of his property as long as he is in the United States and obeys its laws. The purposes of Congress are to preserve enemy owned property in the United States from loss and to prevent every use of it which may be hostile and detrimental to the United States. The duty of the Alien Property Custodian is to protect the property of all owners under legal disabilities to act for themselves. When a license to permit enemy owned business is not granted, the Alien Property Custodian exercises the authority of a common-law trustee; there is no thought of a confiscation or dissipation of property thus held in trust."<sup>51</sup>

On October 29th, 1917, the President issued an Executive order fixing the salary (\$5,000.00) and the powers of the Alien Property Custodian, authorizing him to administer section 12 of the Trading with the Enemy Act, enabling him to designate banks and trust companies as depositories, and allotting him a sum of \$100,000 with which to carry out his duties.<sup>52</sup> In accordance with this authority the Custodian announced that those required to make reports under the Trading with the Enemy Act were

"all persons in the United States who have custody or control of property belonging to 'enemy or ally of enemy', or

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<sup>49</sup> Official Bulletin, Oct. 26, 1917.

<sup>50</sup> *Ibid.*, No. 146, 4, Oct. 30, 1917.

<sup>51</sup> Official Bulletin, No. 159, 1, Nov. 14, 1917.

<sup>52</sup> *Ibid.*, No. 147, 4, Oct. 31, 1917.

who are indebted to them. All corporations are to report officials, directors, or stockholders who are enemies or allies of enemy; insurance companies, policies held by them; banks, bank accounts; safe deposit companies, boxes; executors, trustees and fiduciaries, estates of enemies or allies of enemy."<sup>53</sup>

On January 26, 1918, the Alien Property Custodian made his first report, covering operations from the creation of the office in October to January 1st.

"It soon became apparent," the Report reads in part, "that the business to be transacted by the Custodian would be very like in character to that which is conducted by large trust companies in the United States, with this distinction, however, that whereas the ordinary trust company accumulates its trust estates through a long period of time by normal and gradual growth and thus is enabled to build its organization to accommodate the growing demands of such business, the trust estates to be received and operated by the Alien Property Custodian would be turned over to him in a veritable flood immediately upon his undertaking the performance of his duties, requiring from the very beginning a large organization of skilled persons. This further difference was apparent, that in the case of the Alien Property Custodian it may be necessary to uncover by a system of investigation a considerable proportion of the trust estates, which in contemplation of the law ought to be put in his hands. A carefully thought out system of organization was therefore promptly devised, which is somewhat along the lines of the usual trust company organization, with such modifications as the distinctions above mentioned seemed to require.

"Five bureaus have been created, each in charge of a director:

(1) Bureau of administration, charged with the duty of operating the machinery of the entire organization.

(2) Bureau of investigation, to which all reports are referred and which is charged with the duty, after full and thorough investigation of each case, of determining whether a report discloses the proper subject matter of a trust to be taken over by the custodian.

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<sup>53</sup> *Ibid.*, No. 165, 4, Nov. 21, 1917.

(3) Bureau of trusts, to which such reports are referred after proper action by the bureau of investigation, which said bureau of trusts exercises the powers and duties vested in the Alien Property Custodian under the Trading with the Enemy Act. \* \* \*

(4) Bureau of audits, designed to constitute a check upon the operation of all the other bureaus, and to examine and audit the books and accounts of depositaries and all businesses and estates operated and held by the Alien Property Custodian. \* \* \*

(5) Bureau of law, to act as the legal adviser to the custodian and the various bureaus, and to conduct litigation in which the custodian or the estates in his custody may be interested.

\* \* \* \* \*

"So far the work of this office has been chiefly concerned with the formal reports made as required by the act, and up to December 31, 1917, such reports to the number of 11,167 have been received, filed and recorded . . . As rapidly as they can be examined and a decision reached as to whether possession of the enemy property disclosed thereby should be taken by the Alien Property Custodian, demands for possession are being issued and served upon the persons having the same in their custody and control . . . and depositaries designated in different parts of the country for the purpose of receiving and holding such property."<sup>64</sup>

"Below is a statement of the trust accounts at the close of business December 31, 1918:

Cash deposited with United States Treasury .....	\$ 330,250.98
Stocks .....	53,984,04.59
Bonds .....	25,547,038.42
Mortgages .....	3,754,736.96
Notes receivable .....	2,725,370.87
Accounts receivable .....	37,733,713.07
Real estate .....	2,206,219.03

General business, miscellaneous, merchandise, etc.:

Businesses and estates in operation and liquid.	\$11,052,337.24
Wool and silk .....	58,000.00
Fur, hides, skins, and other animal products...	40,413.01
Tobacco .....	819,966.70
Cotton .....	82,400.00

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<sup>64</sup> Official Bulletin, Jan. 26, 1918, pp. 9-12. *Ibid.*, p. 11.

Breadstuffs and other agricultural products..	151,266.74	
Metals .....	86,453.31	
Minerals and oils .....	191,500.00	
Textiles .....	35,911.47	
Jewelry, precious stones, paintings, etc.....	278,346.67	
Machinery and tools .....	36,672.00	
Household goods, clothing, etc. ....	81,150.73	
Other manufactured products .....	28,188.00	
Other articles not specified .....	5,901.00	
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	\$12,948,506.87	
Less loans, accounts payable, and other claims	4,625,309.01	8,323,197.86
		<hr/>
Total trusts entered .....		\$134,605,231.78
Number of accounts opened .....		1,378

These figures had more than trebled in the next seven months; compare the Synopsis of Trust Accounts of the A. P. C. at close of business July 31, 1918:

Cash deposited with secretary-treasurer:

Invested in Government securities.....	\$42,970,027.82	
Uninvested .....	2,807,905.63	
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		\$ 45,777,933.45
Stocks .....	149,489,387.70	
Bonds (other than investments made by secretary-treasurer)	53,398,829.97	
Mortgages .....	9,063,667.98	
Notes receivable .....	5,918,517.46	
Accounts receivable .....	54,466,539.43	
Real estate .....	6,028,100.71	
General business and estates in operation or liquidation, etc....	83,059,128.35	
Enemy vessels .....	34,193,690.00	
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Total .....		\$441,395,795.05
Number of trusts reported to Alien Property Custodian.....		23,405
Number of trusts opened .....		13,765 <sup>55</sup>

The large amount of enemy money and property now in the Custodian's hands awaiting formal opening as trusts will bring the amount of enemy money and property he has taken over to considerably above the half-billion-dollar mark. The above statement shows that the Alien Property Custodian is the largest individual buyer of Liberty bonds in this country. Every dollar of enemy money taken over by him is sent to the Treasury to be invested in

<sup>55</sup> Official Bulletin, August 6, p. 4.

Liberty bonds. When possible all enemy property taken over is converted into cash and the proceeds invested in Liberty bonds.<sup>56</sup>

Extensions of the power of the Alien Property Custodian have been made during the present year. On February 6th the President by a proclamation under the authority of the Trading with the Enemy Act and the Revised Statutes 4067-4070 included within the term "enemy" "every such alien enemy who is transferred, after arrest, into the custody of the War Department for detention during the war," so that the property of interned enemies may now be taken over by the Custodian.<sup>57</sup> On February 26th the President issued an Executive order more clearly defining the powers of the Custodian and greatly facilitating the transaction of business between the public and the custodian.

"Under these regulations the Alien Property Custodian will be able to demand, receive and administer as a trust estate any interests which any enemy has in property in the United States, both tangible and intangible. Where the property is incapable of physical delivery or immediate conversion into money, the Alien Property Custodian will be able to step into the shoes of the enemy and exercise all the rights and powers with respect thereto which the enemy could exercise if no state of war existed.

"The Alien Property Custodian will be able also to make terms for the collection of enemy money and the delivery will be able to demand, receive and administer as a trust estate any of enemy property, granting time, indulgence, or accepting security for the same. The new Executive order also greatly facilitates the administration of the property in the Alien Property Custodian's hands. Means are provided for the payment of expenses of administration out of the income of the enemy property, and the Alien Property Custodian will have the right to exercise any right, power or authority over corporate stock or beneficial interests of the enemy in American corporations which the enemy himself might exercise if no state of war existed."<sup>58</sup>

As a result of an Executive order of April 4th, the Alien Property Custodian has created a selling organization to dispose of the 140 German owned corporations in the country, the value of which is approximately \$250,000,000. Forty of these with a capitaliza-

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<sup>56</sup> *Ibid.*

<sup>57</sup> Official Bulletin, Feb. 6.

<sup>58</sup> Official Bulletin, Mar. 2.



tion of over \$100,000,000 are now ready for sale.<sup>59</sup> Some of the larger reorganizations mentioned by the Official Bulletin are:

Hackfeld Corporation—Hawaii—sugar plantations—assets over..	\$15,000,000 <sup>59</sup>
German-Amer. Lumber Co.—140,000 acres in Florida—value over	3,000,000 <sup>61</sup>
Pavenstadt Land Co.—Porto Rico—capital.....	300,000 <sup>62</sup>
Central Los Canos Co.—Porto Rico—capital.....	500,000 <sup>63</sup>
Alsen Portland Cement Co.—Alsen, N. Y.—capital.....	2,400,000 <sup>64</sup>
Shulte and Koerting Co., Phila.—ship's valve plant—value.....	1,700,000 <sup>65</sup>
Becker Steel Co.—W. Va.—owned patent rights in the U. S. for the manufacture of "high-speed steel," so impor- tant in the construction of aeroplane and automobile motors, and of dental and surgical tools—authorized cap.	750,000 <sup>66</sup>
L. Vogelstein & Co.—metal concern—assets.....	9,000,000 <sup>67</sup>
Beer, Sondheimer & Co.—metal concern—assets.....	5,000,000 <sup>67</sup>
Bosch Co.—Plainfield, Mass.—manufacturers of magnetos for aeroplanes, automobiles, etc.—capital stock, \$25,000— estimated value .....	5,000,000 <sup>68</sup>
Heyden Chemical Works, Garfield, N. J.—exclusive use of many valuable patents and formulas for making by- products of carbolic acid—in 1917 a business of.....	4,000,000 <sup>69</sup>

More important still are the Hamburg-American and North German Lloyd Steamship Companies (docks, piers and vessels)<sup>70</sup> and the Passaic Woolen and Worsted Mills,<sup>71</sup> which have been taken over without a published estimate of their value. One enemy bank account (with interest) was deposited in the Treasury amounting to \$5,077,000;<sup>72</sup> George Ehret, Jr., of New York City, turned over to the Custodian \$40,000,000, the property of his father residing in Berlin.<sup>73</sup> It has been unofficially estimated that the sum total of money and other property subject to confiscation by the Alien Property Custodian will approach \$1,000,000,000.<sup>74</sup>

<sup>59</sup> Official Bulletin, July 16.

<sup>60</sup> Official Bulletin, Mar. 26.

<sup>61</sup> Official Bulletin, Mar. 26.

<sup>62</sup> Official Bulletin, Mar. 26.

<sup>63</sup> Official Bulletin, Mar. 26.

<sup>64</sup> Official Bulletin, Mar. 27.

<sup>65</sup> Official Bulletin, Feb. 18.

<sup>66</sup> Official Bulletin, July 19.

<sup>67</sup> Official Bulletin, July 24.

<sup>68</sup> Official Bulletin, Apr. 20.

<sup>69</sup> Official Bulletin, Aug. 2.

<sup>70</sup> Official Bulletin, Mar. 8.

<sup>71</sup> Official Bulletin, Mar. 11.

<sup>72</sup> Official Bulletin, Mar. 27.

<sup>73</sup> Official Bulletin, May 6.

<sup>74</sup> N. Y. Times, Oct. 24, 1917.

## PART III. NEUTRAL ALIENS

*Alien Draft*

In the selective-service act of May 18, 1917,<sup>75</sup> the military draft was made to apply to neutral aliens as well as citizens. Section 2 provides that

“such draft as herein provided shall be based on liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of 21 and 30 years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe, not inconsistent with the terms of this act.”

and section 5 provides for registration as follows:

Sec. 5. “That all male persons between the ages of 21 and 30, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; \* \* \* and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this act provided.”

Section 4 provides who are to be exempted by the local boards, including

(f) “All other resident aliens who have not taken out their first papers. Any person who is a resident alien—that is, a citizen or subject of any foreign nation or state other than Germany—who shall not have declared his intention to become a citizen of the United States, upon such presentation to such local board, at any time within 10 days after the filing of a claim of exemption by or in respect of such person, of an affidavit” setting forth certain information.

It thus appears that a non-declarant alien could obtain his exemption upon filing a proper claim therefor. Section 14 provides that

“All laws and parts of laws in conflict with the provisions of this act are hereby suspended during the period of this emergency.”

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<sup>75</sup> Statutes, 65th Cong. Sess. I, ch. 15.

Provost Marshal General CROWDER in his report on the operation of the selective-service act gives the following figures on alienage as a ground of exemption:<sup>76</sup>

Alien exemptions	Number	Ratio to population	Ratio to registration	Ratio to called
Total alien male pop., 21 and over (est.)	2,800,000	.....	.....	.....
Total alien males, 21-30 registered.....	1,243,801	44.42	.....	.....
Total aliens called .....	457,713	.....	36.80	.....
Aliens discharged, exempted, or rejected	381,168	.....	.....	82.28
Aliens certified for service.....	76,545	.....	.....	16.72

"Most of the boards say that no appreciable number of aliens were certified through ignorance on their part of their privilege of exemption. \* \* \* There is no reason to suppose that aliens were not given full consideration in any but a very few instances \* \* \* It must also be remembered that many aliens were strongly sympathetic with the allies' cause and were ready and desirous to serve. An overwhelming majority of the boards, to be sure, report that no appreciable number of aliens were willing to serve \* \* \* The boards' reports seem to show that while allied and neutral aliens are more sympathetic in their attitude to the selective-service law than are aliens with the enemy, their sympathy does not very often find expression in an eagerness to serve in the army."

A number of cases have come up in the federal courts in which aliens certified for service have sought discharge. Three different classes may be distinguished; nondeclarant aliens, declarant aliens, and aliens who have become enemies since the draft. Two chief legal questions are discussed in the opinions in these cases: (1) Are nondeclarant aliens subject to the jurisdiction of the boards established under the conscription act to execute its provisions? (2) What effect does a treaty between the United States and another State providing for the exemption of the latter's subjects from the military service of the United States have on the jurisdiction of the draft boards or the rights of the alien?

In answer to the first, notice the words of Judge MAYER, of the United States District Court for the Southern District of New York.<sup>77</sup>

<sup>76</sup> Official Bulletin, February 13, 1918, p. 7.

<sup>77</sup> *U. S. ex rel Koopowitz v. Finley*, 245 Fed. 871 (Interp. of War Statutes, Bulletin No. 10), also quoted by Judge Tuttle in Bulletin, No. 67.

"It would, of course, have been easy for Congress to except nondeclarant aliens from the registration provision of section 5 \* \* \* It did, however, include all male persons within the draft age \* \* \* Section 5 made all registered persons subject to draft "unless exempted or exused therefrom as in this act provided" \* \* \*

"Further it is quite plain that Congress had in mind that some of those exempted by the act might not claim exemption and might be willing to serve in accordance with the draft \* \* \*

"The whole plan of the act is undoubtedly to require that those who claim exemption shall affirmatively present their claim to the appropriate body so that that body can determine as a fact whether the person falls within the exempted classes. When, therefore, no such claim is presented and the proceedings of the local and district boards are regular in every respect, the court cannot go outside of the proceedings of the boards to determine independently something which the act required should be determined by these boards.

"It is, of course, true, that some who would have been entitled to exemption have failed to claim exemption; but the remedy, if any, in such cases, does not lie with the courts.<sup>78</sup>

Regarding the treaty question, note the opinion of Judge CHATFIELD, District Judge of the Eastern District of New York and his citations.<sup>79</sup>

"But the rules of international law, like those of existing treaties or conventions, are subject to the express acts of Congress, and the courts have not the power to declare a law unconstitutional if it be within the authority given Congress as to legislation, even though the law itself be in contravention of the so-called law of nations. *The Nereide, Republica v. DeLongchamps*, 1 U. S. 111, Opinions of Attorney General, Vol. 10, p. 21.

Observe also the words and citations of Judge TUTTLE:<sup>80</sup>

"The mere fact that this alien was exempt from military service by a treaty entered into before the enactment of the present statute does not entitle him to exemption. This treaty stood upon the same basis as any other law and could be

<sup>78</sup> Cf. U. S. ex rel Max Pascher—Bull. No. 73.

<sup>79</sup> U. S. A. ex rel Pfefer v. Bell, Bulletin, No. 60.

<sup>80</sup> Interpretation of War Statutes, Bulletin, No. 67, p. 9—ex re Blazekovic.

abrogated or suspended by later legislation. The power to abrogate a treaty by statute rests with the Congress, and the responsibility for the wisdom and justice of such action rests where the power is vested. *Cherokee Tobacco Cases*, 11 Wall. 616; *Head Money Cases*, 112 U. S. 500; *Thomas v. Gay*, 169 U. S. 264; *Sanchez v. U. S.*, 216 U. S. 167.

"The rule applicable was thus stated by the Supreme Court in the *Head Money Cases*. \* \* \* A treaty is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined \* \* \* But there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date \* \* \*

"In short, we are of the opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.'"

Moreover section 14 of the Conscription Act provides "that all laws and parts of laws in conflict with the provisions of this act are hereby suspended during the period of this emergency." This provision also settles the question of those aliens who have become enemies since the draft.

#### *Neutral Alien Property—Dutch Vessels*

Mention has already been made of the taking over of enemy vessels by the Executive on the authority of legislation by Congress. Subsequently a considerable extension of this policy of utilizing alien resources has been made by taking over the neutral Dutch shipping in the harbors of the United States. The President issued the necessary proclamation March 20th, 1918:

"Whereas, the law and practice of nations accords to a belligerent power the right in times of military exigency and for purposes essential to the prosecution of war, to take over and utilize neutral vessels lying within its jurisdiction;

"And whereas the act of Congress of June 15, 1917, entitled 'An Act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year

ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' confers upon the President power to take over the possession of any vessel within the jurisdiction of the United States for use or operation by the United States:

"Now therefore, I, Woodrow Wilson, President of the United States of America, in accordance with international law and practice and by virtue of the act of Congress aforesaid, and as Commander in Chief of the Army and Navy of the United States, do hereby find and proclaim that the imperative military needs of the United States require the immediate utilization of vessels of Netherlands registry, now lying within the territorial waters of the United States; and I do therefore authorize and empower the Secretary of the Navy to take over on behalf of the United States the possession of and to employ all such vessels of Netherlands registry as may be necessary for essential purposes connected with the prosecution of the war against the Imperial German Government. The vessels shall be manned, equipped, and operated by the Navy Department and the United States Shipping Board, as may be deemed expedient; and the United States Shipping Board shall make to the owners thereof full compensation, in accordance with the principles of international law."<sup>81</sup>

According to this proclamation the action against neutral shipping is justified on three grounds: (1) 'as being in accordance with international law and practice,' (2) as warranted by "the act of Congress," (3) as within the powers of "the Chief of the Army and Navy." Let us consider these briefly.

Secretary Lansing thus speaks to the question of international law:

"The practice of nations and the opinions of jurists on the right of a belligerent to utilize all vessels which come voluntarily and unconditionally within its jurisdiction are sufficiently well known to render citation of precedent and of authority unnecessary."<sup>82</sup>

This right of angary is defined as "a contingent belligerent right, arising out of the necessity of war 'to dispose of, use, and destroy, if need be, property belonging to neutral States,' as well as belligerent

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<sup>81</sup> Official Bulletin, March 21, 1918, p. 1.

<sup>82</sup> N. Y. Times, April 13, 1918, p. 6.

<sup>83</sup> N. Y. Times, March 17, 1918, p. 16.

erents.”<sup>83</sup> W. E. Hall in his “Treatise of International Law,”<sup>84</sup> gives two examples of its exercise. In the Franco-German War of 1870-1, the German authorities in Alsace seized for military use between six and seven hundred railway carriages belonging to the Central Swiss Railway, and a considerable quantity of Austrian rolling stock, and appear to have kept the carriages, trucks, etc., so seized for some time. Also some English vessels were seized by the German general in command at Rouen, and sunk in the Seine at Duclair to prevent French gun-boats from running up the river and cutting off German communications. The English government did not dispute the right of the Germans to act thus, but demanded that the persons whose property had been destroyed should receive compensation. The Hague Convention of 1907 recognized the right in Regulations of War as follows:

“All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized even if they belong to private individuals, but must be restored and compensation fixed when peace is made.”<sup>85</sup>

Thus this international belligerent right is conditioned on urgent military necessity and is so justified in President Wilson’s proclamation: “the imperative military needs of the United States require,” “times of military exigency” are the phrases used.

The second ground of justification is the act of Congress which confers upon the President power to take over vessels within the jurisdiction of the United States. This would base the taking of the vessels on the right of eminent domain, that is, this neutral shipping is on the same footing as foreign capital which came voluntarily into the country for investment. It is true that vessels are only temporary in their stay, but nevertheless they are permanently engaged in the commerce of the country and furnish opportunities for as permanent investment as do railroads built within the country. The reference to the war power of the President was unnecessary, and probably would have been unavailing in the absence of legislation by Congress.

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<sup>84</sup> 6th edition, pp. 741, 742.

<sup>85</sup> Same as 3.

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